

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 SPENCER EARL ROGERS,

12 Petitioner,

13 v.

14 CHRISTIAN PFEIFFER, WARDEN,

15 Respondent.
16

Case No. 1:20-cv-00142-JDP

ORDER TO SHOW CAUSE WHY PETITION
SHOULD NOT BE DISMISSED FOR
FAILURE TO EXHAUST

ECF No. 1

17 Petitioner Spencer Earl Rogers, a state prisoner with counsel, seeks a writ of habeas
18 corpus under 28 U.S.C. § 2254. ECF No. 1. The matter is before the court for preliminary
19 review under Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, the judge
20 assigned to a habeas proceeding must examine the habeas petition and order a response thereto
21 unless it “plainly appears” that the petitioner is not entitled to relief. *See Valdez v. Montgomery*,
22 918 F.3d 687, 693 (9th Cir. 2019); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).
23 Because the petition contains an unexhausted claim, we will order petitioner to show cause why
24 his petition should not be dismissed.

25 **Discussion**

26 Absent rare circumstances, a state prisoner shall not be granted federal habeas relief
27 unless “the applicant has exhausted the remedies available in the courts of the [s]tate.” 28 U.S.C.
28 § 2254(b)(1)(A). A petitioner can satisfy the exhaustion requirement by providing the highest

1 state court with a full and fair opportunity to consider each claim before presenting it to the
2 federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). The exhaustion doctrine is
3 based on comity; it gives the state court the initial opportunity to correct the state's alleged
4 constitutional deprivations. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*,
5 455 U.S. 509, 518 (1982). The existence of a parallel proceeding in state court warrants this
6 court's abstinence from considering the case. *See Younger v. Harris*, 401 U.S. 37 (1971).

7 Here, petitioner has stated two claims for relief: (1) the trial court erred when it admitted
8 the testimony of the prosecution's gang expert, and (2) petitioner's sentence violates his Eighth
9 and Fourteenth amendment rights. *See id.* at 5-7. Although petitioner has exhausted his first
10 claim, *id.* at 7, his second claim is not exhausted, but rather is pending before the California
11 Supreme Court, *id.* at 8. Therefore, the petition is "mixed"—meaning the petition contains both
12 an exhausted and an unexhausted claim. *See Robbins v. Carey*, 481 F.3d 1143, 1147 (9th Cir.
13 2007). Federal courts must dismiss mixed petitions unless a petitioner can demonstrate he is
14 entitled to a stay and abeyance of his petition.¹ *See Butler v. Long*, 752 F.3d 1177, 1180 (9th Cir.
15 2014) (per curiam).

16 Petitioner may seek a stay under either the *Rhines* or the *Kelly* procedure. *See Rhines v.*
17 *Weber*, 544 U.S. 269, 277 (2005); *Kelly v. Small*, 315 F.3d 1063, 1070–71 (9th Cir. 2002). Under
18 *Rhines*, a "stay and abeyance" is available only when: (1) there is "good cause" for the failure to
19 exhaust; (2) the unexhausted claims are not "plainly meritless"; and (3) the petitioner did not
20 intentionally engage in dilatory litigation tactics. 544 U.S. at 277-78. If petitioner wishes to stay
21 his petition under *Rhines*, he must demonstrate that he meets the three requirements of *Rhines* in
22 his response to this order to show cause.

23
24 ¹ Alternatively, petitioner may move to withdraw his entire petition and return to federal court
25 when he has exhausted his state court claim. However, petitioner is forewarned that the filing of
26 the instant petition does not toll AEDPA's statute of limitations; his new petition must meet
27 AEDPA's filing deadlines. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). Absent rare
28 circumstances, a federal habeas petition must be filed within one year of "the date on which the
judgment became final by the conclusion of direct review or the expiration of the time for seeking
such review." 28 U.S.C. § 2244(d)(1)(A).

1 Under *Kelly*, a three-step procedure is used: (1) the petitioner amends his petition to delete
2 any unexhausted claims; (2) the court in its discretion stays the amended, fully exhausted petition,
3 and holds it in abeyance while the petitioner has the opportunity to proceed to state court to
4 exhaust the deleted claims; and (3) once the claims have been exhausted in state court, the
5 petitioner may return to federal court and amend his federal petition to include the newly-
6 exhausted claims. *Kelly*, 315 F.3d at 1070-71 (citing *Calderon v. U.S. Dist. Court (Taylor)*, 134
7 F.3d 981, 986 (9th Cir. 1998)). However, under *Kelly*, petitioner will only be able to amend his
8 petition with his newly-exhausted claim if it is “timely.” See *King v. Ryan*, 564 F.3d 1133, 1140-
9 41 (9th Cir. 2009). His amended petition will be timely if either (1) the amended petition is filed
10 within AEDPA’s statute of limitations, see 28 U.S.C. § 2244(d), or (2) the new claim “relates
11 back” to his claims in his initial petition. See *King*, 564 F.3d at 1143; *Mayle v. Felix*, 545 U.S.
12 644, 664 (2005). A claim that simply arises from “the same trial, conviction, or sentence” does
13 not necessarily relate back to the initial claims. See *Mayle*, 545 at U.S. 659. To “relate back,” the
14 new claim must share a “common core of operative facts” with the claims in the pending petition.
15 *Id.*

16 Here, because petitioner’s first claim attacks the trial court’s actions and his second claim
17 seeks a youthful offender parole hearing in light of a new state rule, petitioner may have difficulty
18 showing that these claims share a common core of operative facts. For that reason, we will
19 require petitioner to notify this court of his intention to proceed under *Kelly* before we stay his
20 petition under *Kelly*. Once his second claim is exhausted in state court, he may seek to amend his
21 petition with the newly-exhausted claim.

22 **Order**

23 Within 30 days of the service of this order, petitioner must show cause why his petition
24 should not be dismissed for failure to exhaust. In his response, petitioner must either state his
25 grounds for a *Rhines* stay or state his intention to proceed with a *Kelly* stay. If petitioner elects a
26 *Kelly* stay, he must file an amended petition containing only his exhausted claim.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated: March 24, 2020


UNITED STATES MAGISTRATE JUDGE

No. 206.